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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1988

JACKSON WARREN, Petitioner,

vs.

CITY OF LINCOLN, NEBRASKA,
JAMES BREEN, SANDRA L. MYERS,
and DAVID BEGGS, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

James R. Mowbray
Counsel for
Petitioner
Dorothy A. Walker
201 N. 8th St.
Suite 242
Lincoln, NE
68508
(402) 476-3882

Cooperating Attorneys
for the Nebraska
Civil Liberties Union

Richard Sievers
Counsel for
Respondent
530 S. 13th St.
Suite A
Lincoln, NE
68508
(402) 475-2595

QUESTIONS PRESENTED

1. Does federal circuit appellate jurisdiction, en banc, upon a rehearing following a petition for rehearing, authorize the consideration of argument and theory advanced for the first time in a party's supplemental brief on rehearing en banc if said argument and theory were conceded by the party in the party's petition for rehearing, in the party's brief and argument at time of initial appeal and at time of trial?

2. Does the Fourth Amendment to the United States Constitution by and through the Fourteen Amendment prohibit police officers, acting under the authority of the state, herein the State of Nebraska, from holding a traffic warrant arrestee in custody beyond that time necessary to process him for the traffic warrant in order to investigate his role in other

unrelated felony crimes by coercing nontestimonial physical characteristics absent a showing of probable cause on the unrelated felony crimes?

3. Do the Fifth and Sixth Amendments to the United States Constitution by and through the Fourteenth Amendment entitle a traffic warrant arrestee to assistance of counsel when he is taken into custody, pursuant to an arrest warrant for speeding and failing to appear, which carries a penalty of three months imprisonment, and detained in custody for questioning, fingerprinting and photographing on unrelated felony investigations?

4. Is the determination of probable cause initially a question of fact for the jury in a civil rights action for unlawful detention under 42 U.S.C. 1983?

5. Is the issue of defendant police

officers' entitlement to qualified immunity a question of law to be determined by the trial court in a cause of action under 42 U.S.C. 1983?

6. If, pursuant to its own policies and procedures, a municipality through its chief of police, trains its officers to routinely detain traffic warrant arrestees in custody for questioning on unrelated misdemeanor and felony offenses for which the officers have only reasonable suspicion, and its officers routinely so proceed, is the municipality liable for damages for denial of counsel, unlawful detention, and unlawful search under 42 U.S.C. 1983, to a traffic arrestee detained in custody for uncounseled interrogation and coerced nontestimonial physical characteristics relative to unrelated felony crimes for which its officers had only reasonable

suspicion but not probable cause?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Jackson Warren, and the respondents, City of Lincoln, Nebraska, James Breen, Sandra L. Myers and David Beggs.

The petitioner Jackson Warren respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in the above-entitled proceeding filed on January 4, 1989.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

JACKSON WARREN, Petitioner,
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CITY OF LINCOLN, NEBRASKA,
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and DAVID BEGGS, Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE EIGHTH CIRCUIT
COURT OF APPEALS

The petitioner Jackson Warren respectfully prays that a writ of certiorari issued to review the judgment and opinion of the Nebraska Supreme Court entered in the above-entitled proceeding on January 4, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, en banc, upon Petition for Rehearing, is reported at 864 F.2d 1436, and is reprinted in the Appendix A hereto. The opinion of the three judge panel for the United States Court of Appeals for the

Eighth Circuit, is reported at 816 F.2d 1254 and is reprinted in the Appendix B hereto.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Eighth Circuit is invoked under 28 U.S.C. 1254(1). The jurisdiction of the Eighth Circuit was invoked under 28 U.S.C. 1291. The jurisdiction of the United States District Court for Nebraska was invoked under 28 U.S.C. 1343 (13).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States Articles IV, V, VI and Article XIV.

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . .
> but upon probable cause. . .No person shall be. . .compelled in any criminal case to be a witness

against himself nor be deprived of life, liberty, or property, without due process of law . . .In all criminal prosecutions, the accused shall enjoy the right. . .to have the Assistance of Counsel for his defense. . .No State shall deprive any person of life, liberty, or property, without due process of law.

FEDERAL STATUTORY PROVISIONS

42 U.S.C. 1983
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATE STATUTORY PROVISIONS

Section 29-427
Any peace officer having grounds for making an arrest may take the accused into custody or, already having done so, detain

him further when the accused fails to identify himself satisfactorily, or refuses to sign the citation, or when the officer has reasonable grounds to believe that (1) the accused will refuse to respond to the citation, (2) such custody is necessary to protect the accused or others when his continued liberty would constitute a risk of immediate harm, (3) such action is necessary in order to carry out legitimate investigative functions, (4) the accused has no ties to the jurisdiction reasonably sufficient to assure his appearance, or (5) the accused has previously failed to appear in response to a citation.

NOTICE TO ATTORNEY GENERAL OF STATE OF NEBRASKA

The petitioner challenges the constitutionality of Nebraska Revised Statutes 29-427 and notices the attorney general of the State of Nebraska of said challenge.

STATEMENT OF THE CASE

Jackson Warren was contacted in his parked automobile around 4:30 a.m. on April 13, 1985, by two Lincoln police officers, who were investigating a report by a male that a slender white male, mid-twenties, wearing a white short sleeved shirt attempted to break into his second story apartment through a window. The first officer to contact Warren was Alexander with his police dog that had tracked from the vicinity of the attempted break-in at 15th & C Streets to the vicinity of Warren's parked vehicle between 19th and 20th on C Street. Warren was inside the vehicle. As the police converged on the area, Warren attempted to drive away. At Alexander's direction, Warren parked his vehicle and remained inside of it. At the direction of another officer, Myers contacted

Warren in his vehicle, questioned him briefly, and upon running a warrant check found that Warren had an outstanding traffic warrant for speeding and failing to appear. Myers arrested Warren on the failure to appear warrant, performed a pat-down search, placed him in her squad car, and transported him to the jail where she turned his custody over to Detective Breen around 5:00 a.m. for questioning relating to the attempted burglary and a series of burglaries and sexual assaults Breen was investigating.

Breen denied Warren's request to contact an attorney and questioned Warren about his whereabouts earlier in the evening. Detective Beggs interrupted the custodial interrogation to examine Warren's hands and shoes for trace evidence. Breen and Beggs took Warren in their custody from the jail to the police

station to obtain numerous prints of Warren's fingers and palms, three mug shots and three polaroid photos. Warren was returned to the jail in the custody of Breen around 6:30 a.m. to post bond on the failure to appear traffic warrant.

Warren was nineteen years old at the time of the arrest, white, male and slender. He was not wearing a white short sleeved shirt, but a pink short sleeved shirt. Appendix A at 2-6. Appendix B at 2-6.

The issues at jury trial under Warren's 42 U.S.C. 1983 complaint were:

> Whether the failure to appear traffic warrant authorized the police to detain Warren in custody, without counsel, to question him on the April 13, 1985 attempted break-in, other burglaries and sexual assaults under investigation by the Lincoln Police Department and to obtain nontestimonial physical evidence to aid in the felony investigations, under a showing of reasonable suspicion; whether the City of Lincoln's long standing policy and procedure of detaining traffic

warrant arrestee's for interrogation and investigation of the arrestee's involvement in other crimes denies the arrestee's Fourth, Fifth, Sixth and Fourteenth Amendment rights under 42 U.S.C. 1983; and whether the respondents were entitled to qualified immunity.

The issues on appeal to the three judge panel were:

> Whether the trial court erred in instructing the jury that Warren had been arrested for a traffic violation when there was evidence that in fact he had been arrested as a suspect in an attempted burglary; Whether the trial court erred in instructing the jury as to the law of custodial arrest and interrogation; whether the trial court misinstructed the jury on the law of qualified immunity; and whether the trial court erred in dismissing, at the close of the appellant's case-in-chief, the complaint as to the City of Lincoln and Officer Myers."

Appendix B at 7-8.

The three judge panel found in favor of the petitioner on all issues and remanded for new trial. Appendix B at 8. The issues upon Petition for Rehearing en

banc remained the same for the respondents as those at trial.

Not until filing their Supplementary Brief on Petition for Rehearing did the respondents assert that the Eighth Circuit en banc could find as a matter of law, probable cause to arrest Warren for the attempted burglary. The four judge plurality agreed with the respondents and affirmed the district court judgment which was adverse to each and every claim made by Warren. Appendix A at 25.

Judge Gibson's concurring affirmance found that the issue of unlawful detention was properly submitted and that the officers were protected by qualified immunity by their reliance on the Nebraska statute (29-427 set forth at page xi herein). Gibson found this statute did not violate clearly established law. Appendix A at 25-26.

The four judge dissent maintained the three-judge panel opinion and further found that the plurality opinion was "without authority to hold that there was probable cause to arrest Warren for attempted burglary." Appendix A at 27.

REASONS FOR GRANTING THE WRIT

> If the plurality opinion of four judges and the concurring opinion of one judge is allowed to stand, then the citizens of the State of Nebraska who are arrested on traffic warrants will be subject to unlawful detention for investigative purposes, including uncounseled, custodial interrogation and coerced non-testimonial physical characteristics on unrelated felony charges absent a showing of probable cause to believe the traffic arrestee committed the unrelated felony charges.

By opting to exercise their discretion to consider new arguments on appeal to find that the police officers had probable cause to arrest the petitioner for the attempted burglary, the plurality affirms a district court judgment founded on clearly erroneous and constitutionally

infirm jury instructions.

DUE PROCESS INSTRUCTION

The district court instruction on "Due Process of Law" is found at footnote 1 of the panel opinion. Appendix B at This instruction violates clearly established constitutional law held, affirmed and reaffirmed by this Court. The instruction is obviously based upon the clearly erroneous and constitutionally infirm interpretation by the district court and the respondents of Nebraska statute (29-427 set forth at page herein).

Neither the instruction nor the interpretation of the statute requires the officers to have reasonable grounds to believe that Warren, committed the attempted burglary or any other offense the officers had under investigation. The only restriction placed on the police

conduct herein was that of reasonableness of time. Investigatory detention is reasonable only if founded on probable cause for the offense for which the detainee is held. Dunaway v. New York, 442 U.S. 200 (1974).

PROBABLE CAUSE IN 1983 ACTION IS JURY QUESTION

The Eighth Circuit and the majority of the Circuit Courts of Appeals, have consistently held

> . . .that in (42 U.S.C. Section 1983) civil rights actions of this nature, where a genuine issue of fact on the existence of probable cause for arrest is presented, the question should be submitted to the jury.

Giordano v. Lee, 434 F.2d 1227, 1230 (8th Cir. 1970), cert. denied, 403 U.S. 931, 91 S.Ct. 2250, 29 L.Ed. 2d 709 (1971), citing Adickes v. S.H. Kresse & Co., (398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)). This rule was affirmed in Linn v. Garcia, 531 F.2d 855 (8th Cir.

1976).

The First, Third, Fifth, Seventh, Ninth and Tenth Circuit Courts of Appeal are in agreement. B.C.R. Transport Co., Inc. v. Fontaine, 727 F.2d 7,10 (1st Cir. 1984); Dreary v. Three Un-named Police Officers, 746 F.2d 185, 191-192 (3rd Cir. 1984); Reeves v. City of Jackson, Miss., 608 F.2d 644, 648 (5th Cir. 1979); Garris v. Rowland, 678 F.2d 1264, 1270 (5th Cir.1982), cert. denied 459 U.S. 864 (1982); Lester v. City of Chicago, 830 F.2d 706, 715-716 (7th Cir. 1987); McKenzie v. Lamb, 738 F.2d 1005, 1008 (9th Cir. 1984), Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1467 (9th Cir. 1984); Marland v. Heyse, 315 F.2d 312, 314 (10th Cir. 1963).

At trial, petitioner, not the respondents, submitted proposed jury instructions on CAUSE FOR OBTAINING

PHOTOGRAPHS AND FINGERPRINTS (No.7) and PROBABLE CAUSE (No.8). (D.R. 32).

> The obtaining of fingerprints, palm prints, hand printing, and photographs of an individual are nontestimonial identification procedures.
>
> The law of the State of Nebraska states that the compulsion of a person byh (sic) police officers to accompany them to the police station, and the forced submission to nontestimonial identification procedures, is a seizure of such a magnitude that more than mere suspicion is required. There must be a showing of probable (sic) cause to believe the person so seized has engaged in an articulable criminal offense prior to the compulsion and forced submission to said procedures.

State v. Evans, 215 Neb. 435, 441, 338 N.W. 2d 788 (1983).

> Probable cause may be defined as reasonable grounds for action, or the existence of facts and circumstances which would induce a reasonable person to believe that a crime has been committed and that the suspect has committed the crime.
>
> A mere suspicion or belief is never sufficient.

The petitioner's instructions are soundly supported by Dunaway, supra.

Brown v. Illinois, 422 U.S. 590, 45 L.Ed. 2d 416, 95 S.Ct. 2284 (1979); Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed. 2d 676 (1969), and the majority of the circuit Courts of Appeals in the cases previously cited, at page 9 herein.

The law is abundantly clear. "Reasonable suspicion" does not meet the Fourteenth Amendment requirement of probable cause to seize a citizen, detain him in custody and force him to submit to interrogation, and to nontestimonial identification procedures including photographs and fingerprints.

In Dunaway, supra, a suspect was picked up by police officers and held for questioning. Later, the suspect, Dunaway, was convicted after information supplied during his interrogation incriminated him. His motion to suppress

evidence obtained by the seizure was denied by the state court. Reversing the state court's denial to suppress evidence, this Court reversed and rejected the state's contention that Dunaway's seizure was permissible because it was based upon reasonable suspicion and did not amount to an arrest. This Court stated:

> The application of the Fourth Amendment's requirement of probable cause does not depend upon whether an intrusion of this magnitude is termed an "arrest" under state law. The mere fact that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, (citation omitted), obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in Terry and its progeny. Indeed, any "exception" that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are "reasonable" only if based on probable cause. . . . For all but

those narrowly defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

Moreover, two important decisions since Terry confirm the conclusion that the treatment of the petitioner, whether or not it is technically characterized as an arrest, must be supported by probable cause. Davis v. Mississippi, (supra.), considered whether fingerprints taken from a suspect detained without probable cause must be excluded from evidence. The State argued that the detention "was of the type which does not require probable cause," (citation omitted), because it occurred during an investigative, rather than accusatory state, and because it was for the sole purpose of taking fingerprints. Rejecting the state's first argument, the court warned:

"(T)o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon personal security

> of our citizenry, whether these intrusions be termed 'arrest' or 'investigatory detention.'"

Dunaway at 212-215. (Emphasis supplied).

Since 1975, this Court has continuously disapproved of arrests made for "investigatory" purposes on less than probable cause grounds. Brown, supra.

Warren was taken to an interrogation room and his experience is indistinguishable from Davis, Brown and Dunaway. Referring to Brown, this Court condemned the police conduct in Dunaway.

> Our condemnation of the police conduct in Brown fits equally the police conduct in this case:
>
> "The impropriety of the arrest was obvious; awareness of the fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning' . . . The arrest, both in design and in execution, was investigatory. The detectives embarked upon the expedition for evidence in the hope that something might turn up."

Dunaway at 216.

The Dunaway court concluded in 1979 that:

> Detention for custodial interrogation -- regardless of its label -- intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrests.
> Id.

As in Brown, respondents Myers, Breen and Beggs, testified that the purpose of their actions were "for investigation." The detention of Jackson Warren, both in design and in execution, was investigatory. The officers, embarked upon their "expedition for evidence in the hope that something might turn up." Brown at 605.

The Due Process of Law jury instruction completely misled the jury, and was in direct violation of Brown, Davis, and Dunaway. Appendix B at 8, n.1.

Petitioners proposed, yet rejected,

jury instructions placed the issue of probable cause squarely and properly where it belonged, before the jury.

> The task of determining whether probable cause to arrest exists as a matter of law in section 1983 actions is different than a similar determination in the context of a direct review of a criminal arrest. McKenzie v. Lamb, 738 F.2d 1005, 1007 (9th Cir. 1984). Justice Kennedy, writing for the Ninth Circuit, stated:
>
> > In the latter situation, we are called upon to review both law and fact and to draw the line as to what is and is not reasonable behavior. * * * By contrast, in a Section 1983 action the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury * * * .

Id. at 1007-08 (Emphasis supplied).

APPELLATE JURISDICTION TO DETERMINE PROBABLE CAUSE AS AS A MATTER OF LAW IN 1983 ACTIONS UPON EN BANC REHEARING

The record supports that the

respondents did not raise the issue of probable cause as a matter of law until, following the Eighth Circuit's granting their Petition for Rehearing En Banc, they proposed this new position in their Supplemental Brief in Support of Rehearing En Bank at page iv.

STATEMENT OF THE ISSUES

IV

IN A 1983 ACTION PROBABLE CAUSE IS VIEWED OBJECTIVELY AND MAY BE FOUND TO EXIST EVEN THOUGH THE OFFICER FELT HE DID NOT HAVE PROBABLE CAUSE. DETENTION UPON REASONABLE SUSPICION IS NOT UNLAWFUL IF FOR A REASONABLE PERIOD OF TIME AND FOR LEGITIMATE INVESTIGATIVE PURPOSES.

Emphasis supplied.

The four judge plurality took the respondent's bait, giving the Lincoln police not just the "two bites of the apple," Llaguno v. Mingy, 763 F.2d 1560, 1569 (7th Cir. 1985) (en banc), cert. dismissed ___U.S._____, 1075 S.Ct. 16, 92 L.Ed 2d 783 (1986),that they had received

from the Due Process of Law and Qualified Immunity Instructions, but the whole apple and the orchard in which it grows.

The plurality opted to set aside the general rule against considering new arguments on appeal, Wright v. Newman, 735 F.2d 1073, 1076 (8th Cir. 1984) and exercised its discretion to reach the probable cause issue. To do so the plurality relied too broadly on this Court's decision in Singleton v. Wulff, 428 U.S. 106, 120-121 (1976).

> It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.
>
> . . . .
>
> Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, see Turner v. City of Memphis, 369 U.S. 350 (1962), or where "injustice might otherwise result." Hormel v. Helvering, 312 U.S. (552), at 557 (1941).

The plurality's finding of probable

cause to arrest Warren for the attempted burglary resolves the primary issue of this case, at trial and initial appeal.

> Whether the failure to appear traffic warrant authorized the police to detain Warren in custody, without counsel, to question him on the April 13, 1985 attempted break-in, other burglaries and sexual assaults under investigation by the Lincoln Police Department and to obtain nontestimonial physical evidence to aid in the felony investigations, under a showing of reasonable suspicion.

Further, the plurality resolves the secondary issue.

> Whether the City of Lincoln's long standing policy and procedure of detaining traffic warrant arrestees for interogation and investigation of the arrestee's involvement in other crimes denies the arrestee's Fourth, Fifth, Sixth and Fourteenth Amendment rights under 42 U.S.C. 1983.

PRIMARY ISSUE

In 1987, the primary issue herein was initially granted certiorari and then

dismissed as improvidently granted. State v. Blair, 691 S.W. 2d. 259 (Mo. banc 1985), cert. dismissed sub nom Missouri v. Blair, 480 U.S. ____, 94 L.Ed. 2d 678, 108 S.Ct.____ (1987).

The police arrested Blair on an outstanding traffic warrant to detain her in custody for questioning and obtaining fingerprints regarding a homicide investigation for which they did not have probable cause.

> The question is whether. . . defendant's initial arrest was pretextual and rendered her subsequent detention unlawful and evidence obtained incident thereto inadmissable.

Id. at 260.

Blair affirmed the court of appeals' affirmance of the trial court's suppression of her palm prints and statements made at her initial detention. The court relied on a well-seasoned case of this Court, upon which the panel

relied to reverse and remand Warren's case for new trial. United States v. Lefkowitz, 285 U.S. 452 (1932) Id. at 262 and Appendix B at 12.

The Ninth Circuit Court of Appeals has ". . .refused to accept (an outstanding nonsupport) warrant as justification for a search and seizure based on suspicion that defendant was a drug trafficker." Blair at 262 quoting United States v. Prim 698 F.2d 972, 975 (9th Cir. 1983). (Emphasis supplied).

Police use of traffic warrants to arrest and detain in custody the arrestee for investigatory purposes, on an unrelated felony absent probable cause for the felony has not been passed on by this Court. In Singleton v. Wulff, Id. at 121, this Court reversed and remanded the Eighth Circuit Court of Appeals for reaching beyond the issue of standing,

the primary issue in the district court and on initial appeal, to resolve the merits of the case, involving an issue ". . . never passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard."

The injustice of the plurality opinion demands that if the respondents want to assert, after trial and initial appeal, that they did have probable cause to arrest Warren for the attempted burglary, other burglaries and sexual assaults, then, at the very least, Warren is entitled to a new trial to fully explore the previously conceded issue of probable cause.

The plurality opinion grants, in effect, a directed verdict for the

respondents.

That officers Myers, Beggs, Breen and Alexander, testified that they did not believe they had probable cause to arrest Warren on the attempted burglary and the glaring fact that only four of the nine en banc judges found probable cause begs the question. Further, the trial court, by rejecting Warren's probable cause instruction, obviously agreed that probable cause did not exist for Warren's investigatory detention and was not necessary for his detention.

The plurality opinion written by Judge Wollman, who joined in the three judge panel opinion, recites a limited accounting of the evidence at trial on the issue of probable cause. Appendix A at 2-8, 15-17.

Furthermore, the plurality relied exclusively on appeals from criminal

motions to dismiss. Appendix A at 17-22. Justice Kennedy knows that civil rights actions require a different standard of review. McKenzie v. Lamb, supra.

The dissent presents a fuller accounting of the evidence at trial on the issue of probable cause. Myers and Breen conceded at trial they had only "reasonable suspicion"; Police Chief Dean Leitner testified that the description was insufficient in that it "would fit hundreds of thousands of people;" another white male was sitting in his car in the same vicinity as Warren; Alexander felt the dog track was insufficient. Appendix A at 33-37.

CONCURRING OPINION FAILS CONSTITUTIONALITY

Judge Gibson joined in the affirmance of the judgment but did so without reaching the probable cause issue. His satisfaction that the

unlawful detention issue was properly submitted has to be his acceptance that Terry allows custodial detention. This flies directly in the face of Brown, Davis and Dunaway. Warren was detained for investigatory purposes for at least one and one-half hours.

> . . .(A)lthough (this Court) decline(d) to adopt any outside time limitation for a permissible Terry stop, (this Court has) never approved a seizure of a person for the prolonged .90-minute period involved (in place) and cannot do so on the facts presented by this case. See, Dunaway, Supra.

United States v. Place, 462 U.S. 696, 710 (1983). (Emphasis supplied).

CONCURRING OPINION FAILS UNDER EIGHTH CIRCUIT STANDARDS

Further, Judge Gibson "grants" the police officers the defense of good faith qualified immunity based upon their interpretation of Neb. Rev. Stat. Section 29-427, Supra. The Eighth Circuit has clearly held that

> . . . the defense of good faith to a section 1983 action rests on federal policy, not state policy.

Landrum v. Moots, 576 F.2d 1320, 1328 (footnote 16) (8th Cir. 1978).

NEBRASKA REVISED STATUTE Section 29-427 FAILS CONSTTTUTIONALLY AS INTERPRETED BY THE CITY OF LINCOLN, AND THE POLICE OFFICERS

> Lincoln Police Chief Dean Leitner testified that pursuant t Lincoln police department policy, officers were trained to detain individuals arrested for traffic violations for questioning regarding other matters under investigation. . .Leitner also stated that a police officer should take an individual into custody to question him if the officer has reasonable suspicion that that individual committed a crime.

Appendix B at 38-40.

Lincoln's custom of detaining traffi arrestees for investigatory purposes o "reasonable suspicion" grounds would b supported by the statute if, and only if the statute permits officers to detai arrestees ". . .to carry out legitimat investigative functions" RELATING T

OTHER CRIMES, the obvious gloss that the district court, the police officers, and the City of Lincoln added to the statute. This gloss defeats the constitutionality of the statute.

If the statute permits officers to detain arrestees ". . .to carry out legitimate investigative functions" RELATING TO THE CRIME FOR WHICH THE DETAINEE WAS ARRESTED, then the statute is consitutional.

> Where a statute is susceptible of two constructions, under one of which the statute is valid, while under the other it is unconstitutional or of doubtful validity, the Nebraska Supreme Court will adopt the construction which gives the statute validity. State v. Evans, supra.

Appendix B at 46.

The Nebraska Supreme Court has already generally agreed with the panel opinion.

> We agree fully with the statement, relied on by defendant, set out in United States v. Lefkowitz, supra,

> that "[a]n arrest may not be used as a pretext to search for evidence." That proposition has been widely accepted in various courts across the nation. See Warren v. City of Lincoln, Neb., 816 F.2d 1254 (8th Cir. 1987), reh'g en banc granted 825 F.2d 176, and cases cited therein. We have no general disagreement with the statement in Warren, 816 F.2d at 1257: "An arrest ostensibly for one purpose but in reality for the primary purpose of furthering an ulterior goal is unreasonable under the fourth and fourteenth amendments [to the U.S. Constitution]." . . .

State v. Vann, 230 Neb. 601, 605, ___ N.W.2d ___, (Sl. Op. December 16, 1988) (Emphasis Supplied).

RIGHT TO COUNSEL

The plurality's reliance on Kirby v. Illinois, 406 U.S. 682 (1972) to deny Warren's Sixth Amendment right to counsel is clearly erroneous. Warren was in custody on a warrant to arrest him for speeding and failing to appear, a jailable offense. Indeed, he most certainly was subject to adversary judicial criminal proceedings!

MUNICIPAL LIABILITY

Under Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-691 (1977) the City of Lincoln is clearly liable to Warren for damages resulting from his unlawful detention resulting from the unconstitutional "custom" of the city's training her officers to detain traffic warrant arrestees for questioning on unrelated felony offenses on a mere showing of "reasonable suspicion."

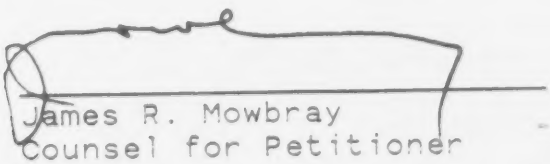
CONCLUSION

Most importantly, this Court must grant certiorari to address the blatantly unconstitutional custom of the City of Lincoln to detain traffic warrant arrestees for investigative purposes on felony offenses absent probable cause; the blatantly unconstitutional denial of counsel to a person detained in custody on a jailable offense; the injustice of

the plurality's reaching the primary issue, an issue never before decided by this Court.; the concurring opinion's unconstitutional affirmance of a judgment based on unconstitutional jury instructions.

Warren's constitutional rights have been violated. Warren is obviously innocent of all the felonies the respondents were investigating. Innocent citizens of the City of Lincoln and the State of Nebraska will continue to suffer similar constitutional violations at the whim of police officers trained to detain them for felony investigatory purposes absent probable cause.

Respectfully submitted,



James R. Mowbray
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1434

Jackson Warren, Appellant,	*	
v.	*	Appeal from the United States District Court for the District of Nebraska.
City of Lincoln, Nebraska; James Breen; Sandra L. Myers and David M. Beggs, Appellees.	*	

Submitted: September 15, 1987

Filed: January 4, 1989

Before LAY, Chief Judge, HEANEY, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, and MAGILL, Circuit Judges, en banc.

WOLLMAN, Circuit Judge.

Jackson Warren filed this suit under 42 U.S.C. Section 1983 (1982)

against the City of Lincoln, Nebraska (the City), and three Lincoln police officers. At the close of Warren's case-in-chief, the district court[1] dismissed the action as against Officer Sandra L. Myers and the City. Upon the conclusion of the trial, the jury returned a verdict in favor of the remaining defendants, Officers James Breen and David Beggs. After hearing the case en banc,[2] we affirm.

I.

At approximately 4:30 a.m. on April 13, 1985, Lincoln police officers responded to a call from a man who claimed someone had just attempted to

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[1]The Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska.

[2]The panel opinion of this court filed previously, Warren v. City of Lincoln, 816 F.2d 1254 (8th Cir. 1987), was automatically vacated when the petition for rehearing was granted.

break into his apartment through a second story window. The man described the intruder, who had fled the scene on foot toward the east, as a slender white male in his early twenties wearing a white short-sleeved shirt. One of the officers who responded to the call was teamed with a police dog, which tracked the intruder's scent east from the crime scene to Jackson Warren's parked car four and one-half blocks away. Warren is a slender white male who at the time of the incident was nineteen years old and wearing a light-colored short-sleeved shirt. As the police approached the car, Warren started his engine and attempted to drive away.

A police officer flagged Warren down and told him to park his car. Officer Myers then approached Warren in his car and asked for some identification. She

briefly questioned Warren and then ran a check on Warren's license from her squad car. She discovered an outstanding warrant for Warren's arrest for failure to appear on a traffic violation. Myers arrested Warren on the failure-to-appear warrant, performed a pat-down search, and put him in her squad car.

Myers took Warren to the Lincoln jail complex and turned him over to Detective Breen at approximately 5:00 a.m. Breen had been investigating a series of burglaries and sexual assaults that had some similarities to the April 13 attempted burglary. Breen questioned Warren on his background and on his whereabouts earlier that day, telling Warren that he was questioning him in connection with recent prowling incidents. At one point during the questioning Detective Beggs entered the

room and examined Warren's hands and shoes, looking for trace evidence. Breen denied Warren's requests to see an attorney and neither Breen nor any other Lincoln police officer read Warren his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966).

After the questioning, Breen took Warren to the police station for fingerprints and photographs. Beggs, who had dusted for fingerprints at the scene of the attempted burglary, took numerous prints of Warren's fingers and palms. Beggs also took three mug shots and three instant camera photos of Warren. Breen then returned Warren to the jail. Warren called two friends, seeking money in order to post bond on the failure-to-appear warrant. After waiting for a friend to arrive with the money and for completion of his release forms, Warren

left the jail at 7:10 a.m.

Warren's complaint alleged that the police officers, pursuant to Lincoln police department policy, violated his constitutional rights in contravention of the fourth, fifth, sixth, and fourteenth amendments by falsely imprisoning him, denying him access to counsel, subjecting him to harassing interrogation, fingerprinting him, and photographing him.

After the district court dismissed the City and Officer Myers from the suit, the jury returned verdicts in favor of Detectives Breen and Beggs. Warren appealed. The panel opinion held that the district court committed error by failing to instruct the jury on pretextual arrest, that the jury instructions on post-arrest detention and qualified immunity were erroneous, and

that the district court improperly dismissed Myers and the City. We conclude that Warren's detention was lawful because probable cause existed to arrest him for attempted burglary. We also conclude that Warren's other grounds for recovery are without merit.

II.

Warren's primary argument is that his detention was in violation of rights guaranteed him under the fourth amendment, made applicable to the states through the fourteenth amendment. We therefore must first ascertain into which of the three categories of police-citizen encounters the encounter between Warren and the officers falls, see United States v. Poitier, 818 F.2d 679, 681-82 (8th Cir. 1987), cert.denied, 108 S.Ct. 700 (1988), for each category justifies a

different level of detention.

The first category consists of consensual communications between officers and citizens, involving no coercion or restraint of liberty. Such encounters do not constitute seizures and thus are beyond the scope of the fourth amendment. See Florida v. Royer, 460 U.S. 491, 497 (1983). The second category is the so-called Terry stop, see Terry v. Ohio, 392 U.S. 1, 21-22 (1968); Florida v. Royer, 460 U.S. at 498-99, pursuant to which an officer having reasonable suspicion that a person has committed or is about to commit a crime may temporarily seize the person for limited investigative purposes. Finally, there are full-scale arrests, which must be supported by probable cause. Poitier, 818 F.2d at 682.

All agree that the officers'

reasonable suspicion of Warren's involvement in the attempted burglary justified the initial stop. The officers argue that Warren's arrest was based on the discovery of the valid arrest warrant, and that the detention at the station was supported by that warrant, as well as their reasonable suspicion of his involvement in the attempted burglary. On rehearing en banc, however, they add the argument that the officers also had objective probable cause to arrest Warren for attempted burglary, and that the detention thus was permissible as incident to a valid arrest.

"As a general rule, we do not consider arguments or theories on appeal that were not advanced in the proceedings below." Wright v. Newman, 735 F.2d 1073, 1076 (8th Cir. 1984) (citations omitted). The pertinent record with respect to the

facts and circumstances surrounding Warren's arrest, however, is fully developed in this case, and those facts and circumstances are uncontroverted. When the issue of probable cause arises in a damage suit and "the facts are not disputed or are susceptible to only one reasonable inference, the question is one of law for the court." Linn v. Garcia, 531 F.2d 855, 861 (8th Cir. 1976) (citations omitted); see also Gramenos v. Jewel Cos., 797 F.2d 432, 438-39 (7th Cir. 1986), cert.denied, 107 S.Ct. 1952 (1987); Garris v. Rowland, 678 F.2d 1264, 1270 (5th Cir.), cert.denied, 459 U.S. 864 (1982). Under such circumstances, the general rule against considering new arguments on appeal has less appeal. See Wright v. Newman, 735 F.2d at 1076. We therefore opt to exercise our discretion in favor of reaching the probable cause

issue. See Singleton v. Wulff, 428 U.S. 106, 120-21 (1976).

A.

Officer Myers and Detective Breen testified that they believed they lacked probable cause to arrest Warren for the attempted burglary. Such testimony, however, does not end the inquiry, for it is well-settled "that '[t]he test of probable cause is not the articulation of the policeman's subjective theory but the objective view of the facts.'" United States v. O'Connell, 841 F.2d 1408, 1419 (8th Cir.) (quoting White v. United States, 448 F.2d 250, 254 (8th Cir. 1971), cert.denied, 405 U.S. 926 (1972)), cert.denied, 108 S.Ct. 2857 (1988).

In Royer, the defendant sought to suppress evidence on the ground that he was being illegally detained when he consented to a search. The Supreme Court

noted that "the fact that the officers did not believe there was probable cause and proceeded on a consensual or Terry-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause* * * ." Id. at 507 (citing Peters v. New York, decided with Sibron v. New York, 392 U.S. 40 (1968). A panel of this court enunciated this principle in Klinger v. United States, 409 F.2d 299 (8th Cir.), cert.denied, 396 U.S. (1969).

> Because probable cause for an arrest is determined by objective facts, it is immaterial that [the officer], at the hearing on the motion to suppress, testified that he did not think that he had "enough facts" upon which to arrest [the suspect] for armed robbery. His subjective opinion is not material.

Id. at 304 (citations omitted,); see also United States v. Salinas-Calderon, 72 F.2d 1298, 1301 (10th Cir. 1984 ("[S]ince courts have never hesitated t

overrule an officer's determination that he had probable cause to arrest, consistency suggests a court may also find probable cause despite an officer's judgment that he did not have probable cause to arrest."); United States v. Lester, 647 F.2d 869, 873 (9th Cir. 1981) ("the validity of the arrest should be judged by whether the arresting officers actually had probable cause for the arrest, rather than by whether the officers gave the arrested person the right reason for the arrest"). Thus, although the officers believed they possessed only reasonable suspicion that Warren was involved in the attempted burglary, a court nevertheless may conclude that there was in fact probable cause. If there was probable cause, the officers' conduct must be adjudged accordingly.

B.

We thus must determine whether the facts available to the officers objectively gave rise to probable cause to arrest Warren for attempted burglary. Probable cause exists when at the moment the arrest was made, "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964) (citing Brinegar v. United States, 338 U.S. 160, 175-76 (1949)). "The determination of whether probable cause exists must not rest on isolated facts; rather it depends on the cumulative effect of the facts in the totality of the circumstances." United States v.

Archer, 840 F.2d 567, 573 (8th Cir. 1988) (citing United States v. Bubis, 744 F.2d 61, 64 (8th Cir. 1984).

The following uncontroverted facts were within the officers' knowledge. A man reported that a slender white male in his early twenties wearing a white short-sleeved shirt had tried to gain entry into his second floor apartment by attempting to force open a window.[3] The

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[3]Nebraska law provides in the following definition of burglary:

A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or an improvements erected thereon with intent to commit any felony or with intent to steal property of any value.

Neb. Rev. Stat. Section 28-507 (1) (Reissue 1985). The relevant portions of the criminal attempt statute provide as follows:

(1) A person shall be guilty of an attempt to commit a crime if he:

* * * *

(b) Intentionally engages in conduct

victim saw the intruder running from the apartment to the east. Officer Alexander, who had arrived at the scene within five minutes, put his tracking dog on the intruder's scent. The dog led the officers to Warren's car, parked four and one-half blocks east of the scene of the attempted burglary. The police had received the call only eleven minutes earlier. It was 4:30 a.m. in a residential neighborhood, with only one other person in the general area. Warren

---

which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.

* * * *

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

Id. Section 28-201. The officers could reasonable believe that one who climbs to a second story window and tries to force it open has attempted burglary.

is a slender white male, who was nineteen years old and wearing a light-colored short-sleeved shirt. As the officers approached his car, Warren attempted to drive away. We believe that these facts and circumstances would warrant a prudent person in believing that Warren was the intruder.

In United States v. Skinner, 412 F.2d 98 (8th Cir.), cert.denied, 396 U.S. 967 (1969), officers were looking for a bank robber described as a white male, 35-45 years old, slender in build, less than five feet six inches in height, having brown hair turning gray, in need of a shave, and hatless. See id. at 101. A panel of the court found probable cause to arrest a suspect fitting the description, found at 1:15 p.m., one hour after the robbery, sitting at a lunch counter in a hotel in the same geographic

area where the robber was reported to have fled. See id. at 100-02. In some respects the description in Skinner was more specific than that in this case. Here, there was no mention of the intruder's height, hair color, amount of beard growth, or presence or absence of a hat. On the other hand, the description was more precise here in that it contained the color and style of the intruder's shirt. More importantly, Warren was found much sooner after the crime, at a time when far fewer people would be about, in a residential area as opposed to a business establishment, and had been located by use of a tracking dog.

In Klingler, officers learned, at 4:00 a.m., of a robbery by a man wearing sunglasses, a green jacket, and needing a shave. See 409 F. 2d at 301. The robber

was believed to be one of two occupants of a 1955 or 1956 white and brown Pontiac, having Minnesota license plates and having two construction helmets visible through the rear window. See id. at 301-02. An hour later, a car parked in a private parking lot began to move as an officer drove by. The officer stopped the car, which was a 1957 white and salmon or coral Pontiac with South Dakota license plates, and which had two construction helmets visible through the rear window. Id. at 302. The court found probable cause to arrest the passenger, who was wearing an olive waistcoat and had two days' growth of beard. Sunglasses were also on the car's dashboard. See id. at 303-04. Again, the officers who arrested Warren had more facts before them than did the officer in Klingler. They had a more detailed

description of the suspect and they found Warren much sooner after the crime. They found Warren in the general vicinity in which the intruder had fled, and a tracking dog had led them to Warren. In Klingler, the officer did have a general description of the car, although the suspect's car varied from the description with respect to the license places and color. These cases demonstrate that under the facts within the officers' knowledge, viewed objectively, probable cause existed to arrest Warren.

Other cases also support a finding of probable cause under these facts. See, e.g. United States v. Valez, 796 F.2d 24, 25-27 (2nd Cir. 1986) (probable cause where race, age, and clothing matched description, and suspect was found in immediate area of crime within a short space of time, despite fact that

description contained no mention of facial hair and arrestee had thick mustache and small beard), cert. denied, 107 S.Ct. 957 (1987); United States v. Slipka, 735 F.2d 1064, 1065-66 (8th Cir. 1984) (probable cause where suspect matched detailed clothing description and suspect fled upon eye contact with officer); Hollman v. Rundle, 461 F.2d 758, 759 & n.1 (3d Cir. 1972) (probable cause to arrest suspect whose race, height, hair color and style, and clothing color fit description and was found one night after the crime near the scene with a man closely fitting a second description); Dessus v. Pennsylvania, 452 F.2d 557, 562 & n.9 (3rd Cir. 1971) (probable cause where defendant matched description as to race, height, and clothing color, and was found five blocks away within minutes of the crime,

at 4:30 a.m. in a racially-mixed neighborhood, with very few people afoot in the vicinity), cert. denied, 409 U.S. 853 (1972).

C.

Because we conclude that probable cause existed to arrest Warren for attempted burglary, Warren's assertion that his detention violated his constitutional rights must be rejected. The "Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." Gerstein v. Pugh, 420 U.S. 103, 114 (1975). A valid warrantless arrest, however, provides legal justification "for a brief period of detention to take the administrative steps incident to arrest." Id. In United States v. Boyer, 574 F.2d 951 (8th Cir.), cert. denied, 439 U.S. 967 (1978),

the arrestee arrived at the police station at 3:30 p.m., was subjected to various administrative procedures until 4:30 p.m., questioned by FBI agents until 5:45 p.m., and taken before a magistrate late the next morning. See id. at 952-53. We held that this was not unnecessary delay under Rule 5(a) of the Federal Rules of Criminal Procedure. See id. at 955. Warren was detained at the jail for approximately two hours and twenty minutes. During that time he was questioned about his background and activities that night, fingerprinted, photographed, processed on the failure-to-appear warrant, and allowed to acquire money with which to post bond. This detention falls well short of the extended restraint of liberty prohibited by Gerstein.

We are left then with the officer's

failure to read Warren the Miranda warnings and Breen's denial of Warren's requests to see counsel. The reading of Miranda warnings is a procedural safeguard rather than a right arising out of the fifth amendment itself. See Miranda, 384 U.S. at 467. Thus, the remedy for a Miranda violation is the exclusion from evidence of any compelled self-incrimination, not a section 1983 action. See Bennett v. Passic, 545 F.2d 1260, 1263 (10th Cir. 1976); Thorton v. Buchmann, 392 F.2d 870, 874 (7th Cir. 1968); Hampton v. Gilmore, 60 F.R.D. 71, 81 (E.D. Mo.), aff'd, 486 F.2d 1407 (8th Cir. 1973); cf. Hensley v. Carey, 818 F.2d 646, 649-50 (7th Cir.) (no section 1983 claim for officer's failure to conduct a Stovall and Brathwaite-type line-up), cert.denied, 108 S.Ct. 456 (1987). Warren's sixth amendment right

to counsel also was not violated, as that right had yet to attach. Warren never was subjected to adversary judicial criminal proceedings such as formal charges, arraignment, or indictment. See Kirby v. Illinois, 406 U.S. 682, 689 (1972).

Because we conclude that the uncontroverted facts demonstrate that Warren's rights were not violated, the judgment of the district court is affirmed.

JOHN R. GIBSON, Circuit Judge, concurring in the affirmance.

I agree that the judgment should be affirmed. While I agree with Judge Wollman's opinion, I am not convinced that it is necessary that we go this far. The panel opinion demonstrates that the issue of whether the traffic arrest was pretextual was not raised in the trial court. My examination of the record

confirms that it was not. Indeed, an instruction offered by Warren conceded that he did not claim the arrest to be wrongful. (D.R. 40). This issue was not briefed when the case was before the panel. I am satisfied that the issue of unlawful detention was properly submitted. Further, the officers in relying on the Nebraska statute did not violate clearly established law and were protected by qualified immunity.

HEANEY, Circuit Judge, dissenting, with whom LAY, Chief Judge, and ARNOLD and McMILLIAN, Circuit Judges, join.

I respectfully dissent. The majority holds that Police Officer Myers had probable cause as a matter of law to arrest Warren for attempted burglary. It reaches this conclusion--even though Officer Myers conceded in district court that she did not have probable cause to make such an arrest, even though the case

was tried in district court on the theory that no probable cause existed, and even though the issue of probable cause was not presented to this Court on the initial appeal. In light of these facts, and the fact that a reasonable jury could find that probable cause did not exist, this Court is without the authority to hold that there was probable cause to arrest Warren for attempted burglary. For these reasons, as well as those stated in my original opinion, I would reverse and remand.

The existence of probable cause in section 1983 actions constitutes a question of fact for the jury, not this Court, to decide. We, along with several other circuits, have recognized that the question of probable cause is a section 1983 action belongs to the trier of fact. "[I]n civil rights actions of this

nature, where a genuine issue of fact on the existence of probable cause for arrest is presented, the question should be submitted to the jury." Giordano v. lee, 434 F.2d 1227, 1230 (8th Cir. 1970), cert. denied, 403 U.S. 931, 31 S.Ct. 2250, 29 L.Ed.2d 709 (1971), citing Adickes v. S.H. Kresse & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970); Anderson v. Haas, 341 F.2d 497 (3d Cir. 1965); and Marland v. Heyse, 315 F.2d 312 (10th Cir. 1963). This rule was reaffirmed by this Court in Linn v. Garcia, 531 F.2d 855 (8th Cir. 1976), in which we stated:

> Where the facts are in dispute or where they are subject to different inferences, the question of probable cause is for the jury; however, where the facts are not disputed or are susceptible to only one reasonable inference, the question is one of law for the court.

Id. at 861.

The task of determining whether

probable cause to arrest exists as a matter of law in section 1983 actions is different than a similar determination in the context of a direct review of a criminal arrest. McKenzie v. Lamb, 738 F.2d 1005, 1007 (9th Cir. 1984). Justice Kennedy, writing for the Ninth Circuit, stated:

> In the latter situation, we are called upon to review both law and fact and to draw the line as to what is and is not reasonable behavior. * * * By contrast, in a Section 1983 action the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury * * *.

Id. at 1007-08 (citations omitted.) Thus, a finding that probable cause existed as a matter of law is appropriate "only if no reasonable jury could find that the officers did or did not have probable cause to arrest." Id.; see also Lester v. Cit, of Chicago, 830 F.2d 706, 715 (7th Cir. 1987) (question of whether

police had probable cause to arrest plaintiff for disorderly conduct was properly submitted to jury); B.C.R. Transport Co., Inc. v. Fontaine, 727 F.2d 7, 10 (1st Cir. 1984) ("[W]hether or not probable cause exists in any given case invariably depends on the particular fact and circumstances of that case, a question to be resolved by the trier of fact."); Deary v. Three Un-named Police Officers, 746 F.2d 185, 191 (3d Cir. 1984) (ultimate fact of probable cause to arrest plaintiff for bank robbery was for jury to decide); Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1467 (9th Cir. 1984) (if reasonable persons might reach different conclusions about the facts, the establishment of probable cause is for the jury, upon a proper instruction about the law); Reeves v. City of Jackson, Miss., 608 F.2d 644, 650 (5th

Cir. 1979) (probable cause for arrest constitutes jury question as jury could have found that officers had no cause to arrest plaintiff for public intoxication).

The Third Circuit, in Deary, dealt with the precise issue taken up by the majority in this case. It wrote:

> [W]e are required to decide whether summary judgment in Deary's case could properly have been granted on the issue of probable cause. That is, taking all of Deary's allegations as true and resolving all inferences in her favor, whether a reasonable jury could find that the police officers could not have reasonably believed that Deary committed the City Bank robbery, i.e., did not have probable cause for her arrest. Like the Patzig case, we too are faced with substantial circumstantial evidence which would sustain a finding of probable cause: the alleged similarity in appearance and resemblance in physical characteristics of Deary to the suspect pictured in the bank surveillance photographs, as well as Deary's appearance of flight from the arresting officers on the day of her arrest.
>
> Nevertheless, despite considerable evidence which, in our view, would lead

> to a finding of probable cause, in light of Patzig, we cannot say that the trial judge, on the record before him, could summarily decide the issue of probable cause. To the extent that the presence or absence of probable cause depended on the resemblance of Deary to the bank surveillance photographs taken at the time of the robbery, the question necessarily becomes a factual one for jury determination. Nor does the fact that Deary's physical characteristics resembled that of the woman who robbed the bank change our conclusion that those facts, too, were for jury consideration. Moreover, even though Deary concedes that she was "jogging" when the officers apprehended her, whether that activity gave the reasonable perception of flight is also a matter which must be left to the judgment of the jury to take into account together with such considerations as the speed at which she was "jogging" (running), her overall demeanor, and the other aspects of her appearance.
>
> To grant judgment for the defendant police officers at his juncture, therefore, would be to usurp the role which a jury must play in fact finding -- here, determining the ultimate fact of probable cause or the lack of it.

Deary v. Three Un-named Police Officers, 746 F.2d at 191 (footnotes omitted).

In light of these cases, it is clear that an appellate court can find probable

cause for an arrest in a section 1983 case in only two circumstances: 1) when there are no factual disputes surrounding the arrest; and 2) when reasonable persons, in the fair exercise of judgment, could not draw different inferences from those facts.

This Court cannot say that there are no issues of disputed fact in this case because the probable cause issue was conceded at trial and Warren had no opportunity to develope any facts relating to this defense.

If we ignore this important consideration and consider all the facts as presently developed in the light most favorable to Warren, I believe a reasonable jury could find that no probable cause existed to arrest Warren for attempted burglary.

First, the police officers involved

in Warren's arrest and detention testified at trial that they did not have sufficient objective facts on which to base a probable cause finding. Myers testified that she only had a "reasonable suspicion" that Warren had attempted burglary that morning. Detective Breen similarly conceded at trial that, even after detaining and questioning Warren, the police had no probable cause to arrest him. If the police officers participating in the arrest could reach a conclusion different from that of the majority of this Court, it only demonstrates the need to submit the question to the jury.

Second, the description of the suspect was too general to constitute reliable objective evidence. Warren matched the victim's general description of the alleged intruder: a thin, white

male, in his twenties, wearing a light-colored short-sleeved shirt. Yet, Dean Leitner, Chief of Police for the City of Lincoln, testified at trial that this description was not sufficient in and of itself to take an individual into custody because "that would fit hundreds of thousands of people." (T. 164). Although Warren did not have the opportunity to develop this line of questioning at trial, it is quite possible that the factual circumstances surrounding the attempted break-in would lead a jury to discount the reliability of the victim's statements. The record also indicates that another white male was sitting in a car near the general area where the police dog was tracking (T. 244), yet no explanation was given as to why Warren was detained for questioning while the other man was not. (T. 326).

Third, the dog track was of questionable reliability. The majority makes much of the fact that the police dog, hot on the intruder's scent, "led the officers to Warren's car." The majority, however, places more reliance on the dog's ability to hold a track in a residential area than the officers on the scene. Officer Jeffrey Alexander, the officer handling the police dog, testified that he did not feel he could arrest Warren based solely on the track. He stated that car exhaust, gasoline, any number of other chemicals and the scent of another human being interfere with the dog's ability to track. (T. 446). Thus, with further factual development, a jury could reasonably conclude that the dog had lost the scent of the intruder. Because there was another person in the same general area, a jury could also

reasonably conclude that the dog track was inconclusive as to Warren's culpability.

Finally, the majority points to the fact that Warren attempted to leave the area when he saw a police officer. Warren explained at trial that he started to turn his car around because there were a lot of police cars at the corner of 20th & C Streets, and he wanted to avoid "the mess." (T. 15). As stated in the Deary case, whether this activity gave the reasonable perception of flight is a matter which must be left to the judgment of the jury.

These facts, taken as a whole, are not susceptible of only one inference. A jury could reasonably draw the conclusion that the description of the intruder was too general, the dog track too unreliable, and the attempt to leave the

area too ambiguous to constitute objective evidence of probable cause.[4]

In section B of its opinion, the majority states, "We thus must determine whether the facts available to the officers objectively gave rise to probable cause to arrest Warren for attempted burglary." Assuming, without deciding, that this objective standard is appropriate, it remains clear that it is not for this Court to sit as fact-finder, as the majority clearly does.[5]

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[4] The case cited by the majority as support are inapposite, as they are cases in which courts had to directly review criminal arrests. None of the cases involved factual determinations by an appellate court in section 1983 suits.

[5] In section C of the opinion, the majority concludes that probable cause existed to warrant Warren's arrest for attempted burglary. The majority does <u>not</u> say that probable cause exists because the facts are susceptible to only one reasonable inference. Thus, it conclusion can only be categorized as a statement of fact.

In light of the fact that we cannot nor should not say that probable cause existed as a matter of law, this Court should refuse to consider the issue raised by the appellees for the first time in its brief on rehearing en banc.[6]

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[6]The Supreme Court of the United States has stated that "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." Singleton v. Wulff, 428 U.S. 106, 121, 49 L.Ed. 2d 826, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (federal appellate court is justified in resolving an issue where the proper resolution is beyond any doubt, or where an injustice might otherwise result). In Singleton, the Supreme Court chastised this Court, however, for addressing an issue on the merits when one party had had no opportunity to develop or defend its position on the issue at trial level. Id. This Court has held, as a general rule, that we will not consider arguments or theories on appeal that were not advanced in proceedings below, unless the issue can be resolved as a matter of law, the pertinent record has been fully developed, and the opposing party had notice that the specific issue would be raised. Wright v. Newman, 735 F.2d 1073, 1076 (8th Cir. 1984).

If the majority feels compelled to reach the probable cause issue, the most it should do is remand the matter to the district court with directions for a new trial, at which time both parties would have an opportunity to present evidence on the issue. The district court then should submit the issue to the jury with appropriate instructions unless it found the evidence insufficient to create a jury question.

The appellees asked this Court to reverse the panel decision on the issue of pretextual arrest and qualified immunity. As the majority does not rest its decision on either of these legal theories, I will not repeat my discussion in the panel opinion, except to say that I continue to believe that it correctly states the law in this Circuit.

I must, however, comment on Neb.

Stat. Rev. Section 29-427 and the appellees' interpretation of it.

Neb. Rev. Stat. Section 29-427 provides in pertinent part:

> Peace officer; grounds for arrest; detention of accused; grounds. Any peace officer having grounds for making an arrest may take the accused into custody or, already having done so, detain him further when the accused fails to identify himself satisfactorily, or refuses to sign the citation, or when the officer has reasonable grounds to believe that * * *(3) such action is necessary in order to carry out legitimate investigative functions * * *.

Neb. Rev. Stat. Section 29-427 (1983).

Appellees argue that, even if they had no probable cause to arrest Warren for attempted burglary, section 29-427(3) gave them the authority to make an arrest based on the traffic warrant and to detain Warren for questioning with regard to the separate crime of attempted burglary. Not only is such an interpretation contrary to the plain

language of the statute, but it also renders the statute unconstitutional.

As I read this statute, a police officer may detain anyone legally arrested if the officer reasonably believes it necessary to further investigate that person's role in the crime for which he was arrested. It does not grant police the power to make a legal arrest and to detain that person for questioning with regard to a separate crime when there is no probable cause to make an arrest for that crime. Neither the language of provision (3) nor the overall tenor of the statute warrants such a sweeping interpretation.

Furthermore, the appellees' interpretation would render Neb. Rev. Stat. Section 29-427 unconstitutional. Police are not permitted to hold someone in custody beyond the time necessary to

process him with respect to the crime of arrest for the sole purpose of trying to connect that person to another crime. To do so is an unlawful seizure. See Adams v. United States, 399 F.2d 574 (D.C. Cir. 1968), cert. denied sub nom. Roots v. United States, 393 U.S. 1067, 89 S.Ct. 722, 21 L.Ed2d 710 (1969). In Adams, individuals arrested for robbery, brought to the Robbery Squad offices at Police Headquarters at 2:00 p.m. and booked at 4:00 p.m., were then put in lineups for other crimes as to which there was no probable cause to arrest or to detain them. The court excluded the results of the lineups as the incident of an unlawful arrest and custody for interrogation. The court explained:

> Here, the lawful basis for appellants' arrest and detention rested solely on the probable cause for the belief that they had committed an attempted robbery on November 5 at the North Carolina Avenue store.

> There was no probable cause to detain them under arrest for other matters. Rule 5(a) provides that presentment without unnecessary delay shall be made on the charge for which they were arrested. To continue their custody without presentment for the purpose of trying to connect them with other crimes is to hold in custody for investigation only, and that is illegal; its operative effect is essentially the same as a new arrest and, if not supported by probable cause, it is an illegal detention.
>
> * * * *
>
> On the precise facts shown by this record, we think the effect of Rule 5(a) is to convert at least as of 4:00 p.m. ib the afternoon of appellants' arrest, their continued detention at the police station into an unlawful arrest without probable cause in respect of the crime for which they were convicted.
>
> * * * *
>
> An arrest made on probable cause can bring a man lawfully into the hands of police, but that detention does not, absent compliance with Rule 5(a), continue to be lawful for all purposes, including the investigation of his possible connection with other crimes.

399 F.2d at 577-78 (footnotes omitted); see United States v. Poole, 495 F.2d 115, 125 (D.C. Cir. 1974) (Leventhal, J., concurring) (unnecessary delay after arrest is evidence of involuntariness),

cert. denied, 422 U.S. 1048, 95 S.Ct. 2667, 45 L.Ed.2d 701 (1975); Commonwealth v. Lumb, 430 A.2d 1188, 1190 (Sup.Ct. Pa. 1981).

The words of former Chief Justice, then Judge Burger, in his concurring opinion are instructive:

> To my mind, the importance of the investigation of crimes other than that for which the original arrest was made is not that there may be something resembling a new "arrest," but that the period of "unnecessary delay" forbidden by Fed. R. Crim. P. 5(a) has then been reached. Necessary delay can reasonably relate to time to administratively process an accused with booking, fingerprinting and other steps and sometimes even to make same limited preliminary investigation into his connection with the crime for which he was arrested, especially when it is directed to possibly exculpation of the one arrested. However, when delay of presentment to the magistrate is for the purpose of investigation of other crimes, then there is no doubt that the "delay" has become "unnecessary."

Adams v. United States, 399 F.2d at 579 (Burger, J., concurring) (emphasis in original).

I believe that holding a person beyond that time necessary to process him for the crime for which he was arrested

in order to investigate that person's role in other crimes constitutes an unlawful seizure under the Fourth Amendment. Where a statute is susceptible of two constructions, under one of which the statute is valid, while under the other it is unconstitutional or of doubtful validity, the Nebraska Supreme Court will adopt the construction which gives the statute validity. State v. Evans, 215 Neb. 433, 338 N.W. 2d 788, 793 (1983). As appellees' version of Neb. Rev. Stat. Section 29-427 violates the Fourth Amendment, I believe the Nebraska Supreme Court would adopt the interpretation which limits investigatory detention to situations where police need to investigate the detainee's role in the crime for which he was arrested. Thus, any detention beyond the time necessary to process Warren with respect to the

traffic warrant for the purpose of investigating the attempted burglary is not justifiable under Neb. Rev. Stat. Section 29-427 and would constitute an unlawful seizure based solely on reasonable suspicion of the sort prohibited in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). and Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).[7]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[7] The normal procedure for processing a person who fails to appear for a traffic violation entails taking him to a correction officer, booking him, setting bond and releasing him promptly upon payment of bond. The jury should have been instructed that if Warren was held beyond the time necessary to process him, then the detention was an unlawful one.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1434

Jackson Warren, Appellant,	*	
	*	Appeal from the
	*	United States
v.	*	District Court for
	*	the District of
City of Lincoln, Nebraska; James Breen; Sandra L. Myers and David M. Beggs, Appellees.	*	Nebraska

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Submitted: October 17, 1986

Filed: April 17, 1987

Before HEANEY and WOLLMAN, Circuit Judges, and LARSON,* Senior District Judge.

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*The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

HEANEY, Circuit Judge

Jackson Warren, a Lincoln, Nebraska, college student, appeals from the district court's judgment dismissing the 42 U.S.C. Section 1983 action he had against the City of Lincoln and three Lincoln police officers following an adverse jury verdict. For the reasons set forth below, we reverse and remand.

I. BACKGROUND

At 4:30 a.m. on April 13, 1985, several Lincoln City police officers were investigating an attempted burglary in southwest Lincoln. Officer Sandra Myers was on duty in that area when she head Officer Alexander state, over the police radio, that his dog was tracking a suspect in the vicinity of 15th and C Streets. Myers decided to drive towards that intersection. As she did, she heard

Officer Lafevre say that he was going to investigate a parked vehicle on 19th and C Street. She immediately went west on C Street to assist him. Myers and Lafevre arrived at the parked car at about the same time. Jackson Warren was sitting in it.

As the officers converged upon the area, Warren attempted to leave. Officer Alexander and his police dog approached Warren and requested that he pull over, park his vehicle, and remain inside. The officer in charge directed Myers to question Warren.

Myers testified that she approached Warren in his car and asked him for identification, for vehicle ownership information, and for a detailed summary of his evening activities. Warren answered all questions.

After the initial questioning, Myers

went back to her vehicle to conduct a warrant check. She called the police dispatcher and provided the dispatcher with Warren's name, race, sex, and date of birth. She was told Warren had a confirmed warrant for his arrest for speeding and failing to appear on the citation. Myers then arrested Warren, conducted a pat-down search, and put him in the backseat of her vehicle. Myers drove Warren to the jail complex.

At the jail, Myers turned Warren over to Detective James Breen who was investigating recent sex-related burglaries in the southwest area of the City. Myers testified that she turned him over to Breen because she believed Breen could connect Warren to these burglaries.

Breen detained Warren and questioned him extensively on his personal

background. At the outset of the questioning, Warren asked Breen whether he was under arrest and why he was being questioned. Breen told Warren that he was being detained and questioned because he was a suspect in the reported burglary attempt. Warren was not given a Miranda warning. Warren asked to speak with a lawyer and Breen informed him that he did not have a right to a lawyer because he was not formally accused of any crime. Warren then asked to make a telephone call. This request was also denied. Breen grilled Warren with respect to his whereabouts that evening, his explanation for the guard dog tracking to his car, and his sexual history. When the interrogation ended, he was fingerprinted, handprinted, and photographed by Sergeant David Beggs. Warren was released at 6:30 a.m. after

posting bond on the traffic warrant.

Thereafter, Warren filed this section 1983 action against the City and Officer Myers, Sergeant Beggs, and Detective Breen. The complaint alleged that the police officers, pursuant to police department policy, violated Warren's constitutional rights by arresting him without probable cause on April 13, 1985, taking him to the police department, falsely imprisoning him, subjecting him to harassing, crude, and lengthy interrogation without granting his request for counsel, fingerprinting him, and photographing him numerous times. The complaint further alleged Warren suffered severe emotional distress, mental pain, and psychological damage as a result of the intentional acts of the defendants and sought $100,000 in damages from each of the

individual officers and from the City. After a three-day trial, the jury returned a verdict in favor of the defendants. The trial court denied Warren's post-trial motions challenging the verdict; this appeal followed.

The issues on appeal are: 1) whether the trial court erred in instructing the jury that Warren had been arrested for a traffic violation when there was evidence that in fact he had been arrested as a suspect in an attempted burglary; 2) whether the trial court erred in instructing the jury as to the law of custodial arrest and interrogation; 3) whether the trial court misinstructed the jury on the law of qualified immunity; and 4) whether the trial court erred in dismissing, at the close of the appellant's case-in-chief, the complaint as to the City of Lincoln

and Officer Myers. We agree that the court erred in instructing the jury and in dismissing the City and the arresting officer, and remand for a new trial.

II. ANALYSIS.

A. The Arrest and Detention

The first issue is whether the trial court's "Due Process of Law" instruction[1]

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[1]That instruction states in full.

> The Fourteenth Amendment to the Constitution of the United States provides that no state shall deprive any person of his liberty without due process of law. The "liberty" of the individual, which the Constitution thus secures and protects, is not an absolute and unqualified freedom or privilege to do as one pleases at all times and under all circumstances, but is subject always to reasonable restraints including, of course, such restraints as are imposed by law.
>
> After the arrest of the plaintiff in this case and the taking of him to the county-city jail, the police officers had a reasonable period of time in which to do whatever was reasonably necessary to process the plaintiff with respect to the offenses for which he was arrested. He was arrested for speeding and failing to appear in court in connection with the

charge of speeding. During that time the officers properly could question Jackson Warren, examine his hands and shoes, photograph him and take his fingerprints, and otherwise subject him to investigation regarding an offense of attempted burglary or any other offense that the officers then had under investigation. The officers, however, could not properly detain Jackson Warren beyond that period of time reasonable necessary to process Jackson Warren with respect to the offenses of speeding and failure to appear, unless they had reasonable grounds to believe that such action was necessary in order to carry out legitimate investigative functions. If they detained him beyond that time without such reasonable grounds, then detaining him beyond that time was a violation of Jackson Warren's constitutional right not to be deprived of his liberty without due process of law.

Processing Jackson Warren with respect to the offenses of speeding and failing to appear properly could include recording information about Jackson Warren, such as name, address, and identifying characteristics, completing ordinary paperwork, and allowing him to arrange for and post bail.

If the officers had such reasonable grounds, they properly could detain Jackson Warren for a reasonable time to question him and otherwise to carry out legitimate investigative functions.

was correct. In that instruction, the court told the jury that Jackson Warren "was arrested for speeding and failing to appear in court in connection with the charge of speeding" and that "the officers could properly detain Warren beyond that time necessary to process him with respect to that offense if they had reasonable grounds to believe that such action was necessary in order to carry out legitimate investigative functions."

Warren's challenge to this instruction is two-fold: 1) it erroneously advised the jury that Warren

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The Fourteenth Amendment to the Constitution also protects a person's right to counsel. A person who has been arrested and taken into custody for speeding and failing to appear on a charge of speeding has a right to obtain counsel. Preventing a person so arrested and in custody from obtaining counsel upon request is a denial of the right to counsel.

was arrested for failing to appear on a traffic warrant instead of submitting the issue of the reason for the arrest to the jury; and 2) it inaccurately defined the terms under which the police could lawfully detain Warren.[2] We find the instruction faulty on both grounds.

1. Pretextual Arrest.

First, the record is replete with evidence from which the jury could have determined that the arrest of Warren on the traffic offense was but a pretext to get him into custody for questioning regarding the attempted burglary and sex-

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[2]Warren objected to the instruction. He did not, however, specifically object to the instruction on the grounds that it did not address the issue of pretextual arrest. Nevertheless, it was incumbent upon the trial court to properly frame the instruction once it was put in issue. Katch v. Speidel, Division of Textron, Inc., 746 F.2d 1136, 1139 (6th Cir. 1984); Celanese Corp. of America v. Vandalia Warehouse Corp., 424 F.2d 1176, 1181 (7th Cir. 1970).

related burglaries then under investigation by the Lincoln police department. The jury instruction therefore should have provided the jury the opportunity to make the determination. An arrest ostensibly for one purpose but in reality for the primary purpose of furthering an ulterior goal is unreasonable under the fourth and fourteenth amendments. United States v. Lefkowitz, 258 U.S. 452 (1932); Taglavore v. United States, 291 F.2d 262, 265 (9th Cir. 1961); Missouri v. Blair, 691 S.W.2d 259 (Mo. 1985) (en banc), cert. dismissed, U.S. _____, 55 USLW 4402 (Mar.25, 1987) But cf. United States v. Hawkins, 811 F.2d 210 (3d Cir. 1987) (fact that pretext given for arrest does not render invalid an otherwise constitutional search).

In Lefkowitz, prohibition agents

attempted to justify their ransacking of a room and seizure of person papers while executing an arrest warrant as a search incident to an arrest. The search and seizure were held unconstitutional because "[a]n arrest may not be used as a pretext to search for evidence." 285 U.S. at 467.

In Taglavore, the police, suspecting Taglavore of possessing marijuana cigarettes, attempted to execute an arrest warrant for two minor traffic violations in order to search for drugs incident to that arrest. After an altercation, police seized marijuana from Taglavore, and he was subsequently tried and convicted. On appeal, the Court reversed and remanded, reasoning that the police used the traffic warrant as an excuse to search the appellant for marijuana cigarettes and held that

"[w]here the arrest is only a sham or a front being used as an excuse for making a search, the arrest itself and the ensuing search are illegal." 291 F.2d at 265. The facts which contributed to the characterization of the attempted arrest on the traffic warrant as pretextual included 1) routine police procedures for traffic offenses were not followed because traffic offenders were not normally taken into custody; and 2) one of the officers testified, "It was assumed that [appellant] had marijuana cigarettes in his possession. We were going to search him for the cigarettes." The Court noted:

> The violation of a constitutional right by a subterfuge cannot be justified, and the circumstances of this case leave no other inference than that this is what was done with the traffic arrest warrant here. Were the use of misdemeanor arrest warrants as a pretext for searching people suspected of felonies to be

> permitted, a mockery could be made of the Fourth Amendment and its guarantees. The courts must be vigilant to detect and prevent such misuse of legal processes.

291 F.2d at 266.

Lefkowitz and Taglavore present situations where an arrest warrant is executed to justify an otherwise unlawful search as a search incident to that arrest. Nonetheless, we find the reasoning of both cases applicable in the context of an arrest warrant executed for the purpose of justifying detention and interrogation for another crime under investigation.

Applying the law to the facts of this case, we believe the actions of the police in arresting Warren may have violated the fourth amendment. The jury could well have found that Warren's arrest was improperly motivated, undertaken not in furtherance of

constitutionally permissible law enforcement but for the purpose of gathering evidence of unrelated crimes for which the officers did not have probable cause to arrest Warren. The jury should have been so instructed.

It is undisputed that the police initially stopped Warren because they had reasonable suspicion that he had committed the attempted burglary at 15th & C Streets. A police dog tracked from the scene of the crime to the vicinity of Warren's car. The area was strictly residential and no one else was out on the street at the early hour of 4:30 a.m. When the police officers arrived, Warren attempted to leave the area. Moreover, Warren matched the description the police had of the suspect--"a white male in his 20's, slender build, wearing a light-colored or white short-sleeved shirt."

Thus, although the police concede they did not have probable cause to believe Warren had committed the crime, it is clear that they had reasonable suspicion based on his physical appearance, the location of the vehicle, his turn around upon their approach, and the dog track to justify an investigatory stop pursuant to Terry v. Ohio, 392 U.S. 1 (1968).

It is also clear that the police had the right to do a warrant check on Warren's driver's license. Finding the outstanding warrant, they could have arrested him for the traffic violation and processed him through normal channels pursuant to that warrant.[3] But there is a question here whether that was their purpose or whether they arrested him so

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[3]Normal procedures would have entailed taking Warren to correction officers, booking him, setting bond and releasing him promptly upon payment of bond.

that they could bring him to police headquarters and question him about that evening's attempted burglary and the recent sex-related burglaries. The evidence shows that interrogation about the burglaries may have been the reason for the arrest. For example, Myers brought Warren to the jail complex and immediately turned him over to Detective Breen, whom she had in the past aided in investigating the sex-related burglaries. In her testimony, Myers explained why she turned Warren over to Breen: "I just felt that further questioning by somebody who was more familiar with the cases [the other burglaries] themselves could eliminate or possibly give us further--a further suspect in the cases."

Myers never told Warren why he was being detained and questioned. Warren waited approximately fifteen minutes

before he was led to an interrogation room by Detective Breen. Breen testified at his deposition as to why he interrogated Warren:

> Well,* * *some officers had indicated that the police dog had made what they felt was a less than satisfactory trail to his car, * * * a trail that they didn't feel comfortable arresting him for the offense based solely on the track and they therefore made contact with him in the car and they had a warrant and they knew that I was involved in * * * investigating * * * several attempted sexual assaults * * * that would technically be categorized as burglaries that we thought were sexually motivated burglaries and I guess it was their feeling that it might be beneficial for me to talk to him reference those cases.

Breen initially asked Warren for his name and address, about his work and schooling, where he was that evening and who he had been with. But there is evidence to indicate that the purpose of

the detention was not limited to the outstanding traffic infractions. Warren asked if he was under arrest, and Breen said that he was. When Warren asked what he was being questioned for, he was told a "prowling incident." When he asked to speak to a lawyer, Breen told Warren that he did not have a right to a lawyer until he was formally accused of being a prowler. When Warren then asked to make a telephone call, Breen informed Warren that he would have to wait to make his call until Breen was through questioning him.

Furthermore, in the middle of questioning Warren, Breen abruptly turned to the subject of Warren's sexual preference. According to Warren, the interchange was as follows: Breen queried: "Warren are you gay?" Warren asked him why he asked that question.

Breen replied that he had been in the business fifteen years and could pick up on these things. When Warren asked him what he meant, he said "You people have your way of walking and talking differently. What it is, your theater background?" Warren said, "So you're saying that the Lincoln Police Department bases their decision on such assumptions?" Breen got mad and said, "Just answer the question, Warren. Are you gay or not." Warren told Breen he "could give him the names and addresses and telephone numbers of several women throughout the City who would say whether he was gay."

That Warren may have been arrested for investigative purposes rather than on the traffic warrant is further evidenced by the testimony of Sergeant David Beggs. Beggs, a ballistics expert who had been

at the scene of the attempted burglary gathering evidence, arrived at the jail at approximately 6:00 a.m. He testified that he knew Warren was a suspect in the attempted burglary under investigation:

> Beggs: I knew that Mr. Warren had been taken into custody.
>
> Q: As a suspect in this attempted burglary?
>
> Beggs: To a certain extent, yes.

Upon arriving at the jail, Beggs went to the room where Breen was questioning Warren. Beggs testified that he examined the bottoms of Warren's shoes and Warren's hands "to see if they were dirty or had any trace evidence from the roof" of the house where the attempted burglary occurred. Breen then took Warren to the identification bureau at the police station. Instead of taking routine prints of the tips of Warren's ten fingers, as would be done for traffic

offenses, Beggs did extensive printing of Warren's hands, including the palms, the sides of the hands, and the sides of each finger. Beggs explained that "[i]n some cases, particularly in involved cases [such] as a series of sexual assaults that we've already talked with other officers about, further hand prints are desired because everybody when they grab something do[es] not necessarily grab it with the end of their finger." Mug shots and several Polaroids were also taken of Warren. Warren then asked if he could use the phone and if he was still a suspect in the prowling incident. Breen told Warren that he was no longer the main suspect. After Breen left, Warren went to the desk and was told he could use the phone and could leave if he paid $50.00. Warren posted bond and went home.

On the basis of these facts, a jury could have concluded that Warren's arrest on the traffic warrant was nothing more than a subterfuge or pretext executed to get Warren into police headquarters to be questioned about an unrelated matter and as such was unlawful. Accordingly, the trial court erred in not instructing the jury on the law of pretextual arrest and in dismissing the complaint as to Officer Myers. On remand, the jury should be instructed on the law of pretextual arrest.

2. Unlawful Detainment.

Even assuming that the Lincoln Police arrested Warren for failing to appear on a traffic warrant, the due process instruction incorrectly stated that the officers were justified in detaining Warren beyond the time necessary to process him on that warrant.

Police are not permitted to hold someone in custody beyond the time necessary to process him with respect to the crime of arrest for the sole purpose of trying to connect that person to another crime. To do so is an unlawful seizure. See Adams v. United States, 399 F.2d 574 (D.C. Cir. 1968), cert. denied sub nom. Roots v. United States, 393 U.S. 1067 (1969). In Adams, individuals arrested for a robbery, brought to the Robbery Squad offices at Police Headquarters at 2:00 p.m. and booked at 4:00 p.m., were then put in lineups for other crimes as to which there was no probable cause to arrest or detain them. The court excluded the result of the lineups as the incident of an unlawful arrest and custody for interrogation. The Court explained:

> Here, the lawful basis for appellants' arrest and

detention rested solely on the probable cause for the belief that they had committed an attempted robbery on November 5 at the North Carolina Avenue store. There was no probable cause to detain them under arrest for other matters. Rule 5(a) provides that presentment without unnecessary delay shall be made on the charge for which whey were arrested.* * *To continue their custody without presentment for the purpose of trying to connect them with other crimes is to hold in custody for investigation only, and that is illegal; its operative effect is essentially the same as a new arrest and, if not supported by probable cause, it is an illegal detention.

* * * *

On the precise facts shown by this record, we think the effect of Rule 5(a) is to convert at least as of 4:00 p.m. on the afternoon of appellants' arrest, their continued detention at the police station into an unlawful arrest without probable cause in respect of the crime for which they were convicted. It is not, thus, the precise scope of the Mallory exclusionary rule which is determined here but, rather, the sweep of the general policy of excluding evidence gathered

> during a period of detention following upon an unlawful arrest.
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> * * * *
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> The concept of what is, in legal contemplation, a "divisible detention" is not, in our view extra-ordinary. Indeed, it seems to be a necessary one if the subversion of the purposes of Rule 5(a) is not to be made the handmaiden of the constitutionally defective arrest for investigation.

399 F.2d at 577 (footnotes omitted). See United States v. Poole, 495 F.2d 115, 125 (D.C. Cir. 1974) (Leventhal, J., concurring), cert.denied, 422 U.S. 1048 (1975); Commonwealth v. Lumb, 430 A.2d 1188, 1190 (Sup. Ct. Pa. 1981).

The words of former Chief Justice, then Judge Burger in his concurring opinion are instructive:

> To my mind, the importance of the investigation of crimes other than that for which the original arrest was made is not that there may be something resembling a new "arrest," but that the period of "unnecessary delay" forbidden by F.R. Crim. P. 5(a) has then been reached. Necessary delay can reasonably relate to time to administratively process an accused with booking, finger-

> printing and other steps and sometimes even to make some limited preliminary investigation into his connection with the crime for which he was arrested, especially when it is directed to possible exculpation of the one arrested. However, when the delay of presentment to the magistrate is for the purpose of investigation of other crimes, then there is no doubt that the "delay" has become "unnecessary." [Emphasis included.]

399 F.2d at 579.

We find the rationale of the Adams Court persuasive. Thus, assuming that the arrest was proper, the jury could have found the detention for the purpose of trying to connect Warren with the attempted break-in was illegal. The jury could have found that the detention was an unlawful seizure based solely on reasonable suspicion of the sort prohibited by Dunaway v. New York, 442 U.S. 200 (1979), and Florida v. Royer, 460 U.S. 491 (1983).

The jury should have been instructed that if they found that Warren was held beyond that time necessary to process him with respect to the traffic warrant to investigate him about the attempted burglary, a crime which all three officers admitted that they did not have probable cause to hold Warren on, then that detention was an unlawful one.

B. Qualified Immunity.

The second issue is whether the trial court's qualified immunity instruction was erroneous.[4]

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[4]The trial court delivered the following qualified immunity instruction:

If it is determined that a defendant in the course of his duties did violate Jackson Warren's constitutional right to due process of law, as defined by these instructions, that defendant nevertheless will have a complete defense to his actions in this suit, if he shows by the greater weight of the evidence that in carrying out his duties with reference to the conduct involved in the case he had to exercise judgment and discretion and that his conduct was in good faith. Good

Jackson Warren contends that the instruction erroneously omitted the objective component of the qualified immunity defense. Warren's objection misses the mark because the instruction does contain an objective component. Nevertheless, because this case must be retried, we now make it clear that the question of whether the defendants are entitled to qualified immunity is a question of law to be determined by the trial court.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court established an objective test to determine if an

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faith means without malice and reasonably believing that what is being done is lawful under all the circumstances then known or which reasonably should have been known. A police officer does not act in good faith if he knows or, as a reasonable police officer, should know that his acts probably will result in a deprival of someone's constitutional rights.

official is entitled to qualified immunity. If the plaintiff alleges facts that demonstrate a constitutional violation, the court may determine, at the summary judgment stage, whether the alleged conduct violated clearly established law of which a reasonable official would have known. 457 U.S. at 818. Once a court determines as a matter of law that a legal standard governing the governmental action at issue was clearly established, there is no qualified immunity. The factual question whether the officer's conduct violated the established constitutional standard is resolved by the jury at trial. See Davis v. Scherer, 468 U.S. 183 (1984); Mitchell v. Forsyth, 472 U.S. 511, (1985), Creighton v. City of St. Paul, 766 F.2d 1269 (8th Cir. 1985), cert.granted sub nom. Anderson v.

Creighton, U.S. , 106 S.Ct. 3292 (1986);[5] Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1985) (en banc), cert.dismissed, U.S. , 107 S.Ct. 16, 92 L.Ed.2d 783 (1986); and Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336 (7th Cir. 1985).

The district judge in Llaguno instructed the jury on the issue of immunity: "The law allows a defendant to defend a charge of unconstitutional entry by claiming a good faith belief that, under the circumstances, it was reasonable to enter the Llaguno house without a warrant. The defendant also

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[5] In its appeal to the Supreme Court, the government argues that the existence of a settled legal principle is not dispositive of an immunity defense. It argues that a second question must be asked before immunity will be determined and that is whether the official reasonably should have known that his conduct was unlawful under the particular circumstances.

must prove that such good faith belief was reasonable."

The Seventh Circuit found error and directed the court on remand to determine the issue of immunity:

> The issue of immunity is redefined in Harlow is whether when the defendant violated the plaintiff's rights the law appeared to authorize the defendant's misconduct. This is an issue of law, for the judge to decide. What the defendant believed, an issue of fact, is neither here nor there. The good sense of Harlow in withdrawing the issue of immunity from the jury is particularly evident in a case such as this, where the police are charged with having acted without probable cause. The question whether they had probable cause depends on what they reasonably believed with reference to the facts that confronted them, as the judge instructed in the passage we quoted earlier. To go on and instruct the jury further that even if the police acted without probable cause they should be exonerated if they reasonably (though erroneously) believed that they were acting reasonably is to confuse the jury and give the defendants two bites of

the apple.

Llaguno, 763 F.2d at 1569.

Senior Judge Floyd R. Gibson, of this Circuit, expressed a similar view in Moore v. Marketplace Restaurant, 754 F.2d at 1361. Judge Gibson, concurring with Judge Posner on this point, stated:

> The question of [the police officers' immunity may be decided as a matter of law and need not be submitted to the jury. It is clearly established that the Fourth Amendment requires that officers have probable cause for an arrest. Thus, if in this case there was no probable cause for the arrests, an issue to be determined by the jury, then there is no immunity under Harlow, for the official defendants.

Because we agree with the en banc decision of the Seventh Circuit, we hold that it is for the trial court in this case to determine whether the officers are entitled to qualified immunity.

On remand, the jury should initially

determine under proper instructions whether the arrest of Warren was a pretext employed to gather evidence of unrelated crimes. If the jury determines that it was a pretext, then the district court should determine whether the law prohibiting pretextual arrests was clearly established in 1985.[6] If the jury finds that the arrest was not pretextual but rather a lawful arrest pursuant to a traffic warrant, then it should determine whether Warren was detained beyond the time necessary to process the traffic offense for questioning on an unrelated matter. If the jury determines that he was so detained, then the district court should determine whether the law prohibiting such a detention was clearly established

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[6] See United States v. Lefkowitz, 285 U.S. 452 (1932); Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961).

in 1985.[7] The jury should finally determine whether the officers continued to question Warren after he requested counsel. If it answers this question affirmatively, then the district court should determine whether the law prohibiting continued custodial questioning after request for counsel was clearly established in 1985.[8]

C. Municipal Liability.

Warren's final argument is that the district court erred in dismissing the complaint as to the City of Lincoln with prejudice at the close of his case-in-chief. Warren asserts that the jury could have found liability on the part of

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[7] See Dunaway v. New York, 442 U.S. 200 (1979); Adams v. United States, 399 F.2d 574 (D.C. Cir. 1968), cert.denied sub nom. Roots v. United States, 393 U.S. 1067 (1969); Neb. Rev. Stat. Section 29-427.

[8] See Edwards v. Arizona, 451 U.S. 477 (1980).

the city because he proved at trial, through the testimony of the chief of police, that the City of Lincoln failed to train its police officers properly and that this failure caused his injuries.

Municipalities may be sued for damages under section 1983 when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers" or is "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." Monell v. New York Department of Social Services, 436 U.S. 658, 690 (1978). Municipalities are in no way immune from liability from constitutional violations. Owen v. City of Independence, 445 U.S.

622, 657 (1980). If a municipality fails to train its police force, or if it does so in a grossly negligent manner so that it inevitably results in police misconduct, the municipality may fairly be said to have authorized the violations. Patzner v. Burkett, 779 F.2d 1363, 1367 (8th Cir. 1985); Kibbe v. City of Springfield, 777 F.2d 801, 804 (1st Cir. 1985), cert.dismissed sub. nom. City of Springfield v. Kibbe, U.S. , 107 S.Ct. 1114 (1987); Herrera v. Valentine, 653 F.2d 1220, 1224 (8th Cir. 1981); Leite v. City of Providence, 463 F. Supp. 585, 590 (D. R.I. 1978).

Here, Chief of Police B. Dean Leitner testified that he was responsible "for the administration of the Lincoln Police Department, the perpetuation of all rules and regulations, policies and procedures, and adherences to them."

Leitner testified that pursuant to Lincoln Police department policy, officers were trained to detain individuals arrested for traffic violations for questioning regarding other matters under investigation. He testified:

> If an officer has reasonable grounds to believe that the individual may be involved in some other offense he certainly would interview the person regarding that. That may occur immediately following the arrest and quite often individuals are taken from the corrections facility following their incarceration and further interviewed pertaining to a case under investigation.

Leitner also stated that a police officer should take an individual into custody to question him if the officer has reasonable suspicion that that individual committed a crime:

> [I]t's the duty of a police officer, if there is reasonable suspicion, to determine

whether or not that individual is responsible for that criminal offense. He has an equal duty to gather evidence that will free that individual, prove his innocence, as he does to prove his guilt.

Q. What should the officer do, then?

A. Interview him.

Q. Are you saying interview him where the individual is found?

A. No, I'm not saying that.

Q. What should the officer do with respect to interviewing?

A. If he has reasonable suspicion he should take--detain him for questioning either there, or, if necessary, at police headquarters.

Q. He should take him into custody?

A. For the purpose of interviewing, yes.

At the very least, these portions of of Leitner's testimony put into issue the question of whether the Lincoln police department failed to properly train its officers, and thus it was error for the trial court to dismiss the complaint as

to the city. On remand, the jury should be properly instructed on the issue of municipal liability.

Reversed and remanded for a new trial consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.